Supreme Court, U.S.
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OCT 28 1992
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92-803

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER, 1992

WILLIAM R. SPEACHT,
Petitioner,

v.

MOBIL CHEMICAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented by this petition are:

(1) Whether the Plaintiff in a constructive discharge action bears the burden of proving at trial the accrual of the limitations period for filing an administrative charge of age discrimination.

(2) Whether a jury finding that the Plaintiff knew or should have known of the ongoing discrimination which resulted in his constructive discharge for more than 300 days before he filed on administrative charge of age discrimination is sufficient to establish a limitations bar, when a related act of discrimination occurs less than 300 days before the charge was filed.

LIST OF PARTIES

The parties to the proceedings below were the petitioner, plaintiff below, WILLIAM R. SPEACHT, and the respondents, MOBIL CHEMICAL COMPANY INC. and MOBIL OIL CORPORATION, the defendants below.

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NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
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WILLIAM R. SPEACHT,
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v.

MOBIL CHEMICAL COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

The Petitioner, WILLIAM R. SPEACHT, respectfully prays that a Writ of Certiorari issue to review the Opinion and Judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above-entitled proceeding on July 30, 1992.

OPINIONS BELOW

The Order of the Court of Appeals for the Eleventh Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc has not been reported and is reprinted in the Appendix hereto, (A: P.A-5, infra).

The Opinion of the Court of Appeals for the Eleventh Circuit is not reported and is reprinted in the Appendix hereto, (A: P.A-3, infra).

The Final Judgment of the United States District Court for the Middle District of Florida (Restani, D.J.) has not been reported. It is reprinted in the Appendix hereto, (A: P.A-1, infra).

JURISDICTION

This action was removed to the United States District Court for the Middle District of Florida from the Circuit

Court, Fourth Judicial Circuit, in and for Duval County, Florida, on October 26, 1988. The removal was effected pursuant to 28 U.S.C. §1331 and 28 U.S.C. §1337 as well as 28 U.S.C. §1332. On April 8, 1991, the District Court entered judgment in favor of the Respondent, based upon a jury verdict entered April 8, 1991.

On Petitioner's appeal, the Eleventh Circuit on June 1, 1992, entered an Opinion affirming the District Court's Order. Petitioner filed a Petition for Rehearing with Suggestion for Rehearing En Banc which was denied on July 30, 1992. The jurisdiction of this Court to review the judgment of the Eleventh Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

29 U.S.C. §626(d) provides:

> No civil action may be commenced by an individual under this section

> until 60 days after a charge alleging unlawful discrimination has been filed with the Secretary. Such a charge shall be filed--
>
> (1) within 180 days after the alleged unlawful practice occurred; or
>
> (2) in a case to which section 14(b) [29 USCS §633(b)] applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Fed.R.Civ. P.8(c) provides, in pertinent part:

> In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.

STATEMENT OF THE CASE

The Petitioner, WILLIAM R. SPEACHT, was born on October 14, 1927. In 1986,

MR. SPEACHT had been employed for 13 years as a Sales Representative for Respondent, MOBIL CHEMICAL COMPANY.

MR. SPEACHT had rheumatic fever as a child, which left him with a diseased heart. In 1982, he had a mitral valve replacement. He recovered fully and had no physical disability in 1985. MR. SPEACHT had blood pressure problems in the spring of 1986 and side effects from the blood pressure medication.

MR. SPEACHT was placed on short-term disability the first time in July, 1986, and returned to work on September 9, 1986. On October 13, 1986, MR. SPEACHT was again placed on short-term disability. On December 12, 1986, MR. SPEACHT received a release to return to duty from MOBIL CHEMICAL COMPANY'S doctor.

On that same day, December 12, 1986,

MR. SPEACHT had a meeting with his supervisors, about his annual appraisal. The Respondent gave MR. SPEACHT the first unsatisfactory rating he had received in 29 years of sales. MR. SPEACHT was given a set of short-term objectives ostensibly designed to improve his performance.

The Petitioner went back on short-term disability for a third time on December 14, 1986. He remained in that status until his short-term disability was converted to long-term disability on September 15, 1987.

In early January, 1987, the Respondent eliminated the positions of 3 of MR. SPEACHT'S fellow salesmen. Each of the men who were discharged were 50 or older.

On September 1, 1987, the Petitioner met with company representatives to

discuss the change of his status from short-term disability leave to long-term disability leave. MR. SPEACHT inquired whether any other jobs were available for him. The response was negative. MR. SPEACHT repeated his question regarding the availability of any other position by letter dated September 4, 1987. When MR. SPEACHT was placed on long-term disability on September 15, 1987, he was classified as a retiree.

MR. SPEACHT filed his administrative charge of age discrimination with the Equal Employment Opportunity Commission on January 20, 1988.

On September 28, 1988, MR. SPEACHT filed suit against the Respondents, alleging that he was constructively discharged in violation of the ADEA. Numerous incidents of discrimination

harassment were alleged and proved. The Answer was filed on November 22, 1988, and the Respondent's Fourth Affirmative Defense set forth a claim that MR. SPEACHT'S administrative charge had not been filed timely.

The initial trial in this action began on March 8, 1990. The Respondent did not request a jury instruction on the charge-filing issue. Accordingly, the trial judge for the initial jury trial did not instruct the jury on that issue. The initial trial ended with a hung jury, and the court declared a mistrial.

The second trial in this action commenced on April 2, 1991.

The Respondent again did not request an instruction with regard to the timely filing of the EEOC charge.

Shortly before the close of the

Respondent's case, the trial court, who was not the judge who presided over the first trial, held a charge conference. At that time, the judge, sua sponte, suggested the need for an instruction on the charge-filing issue. On this issue the district court stated:

> "My concern is statute of limitations. I think there is [a] material issue of fact here. The cases are that it's not the day he actually leaves employment, it's the day he knew he was going to be forced to leave employment so that's what I'm going to ask the jury to decide...."

The trial court composed its own instruction on the issue and, over objection, read the following instruction:

> Now, if you find that the plaintiff has failed to prove any one of these elements your verdict must be in favor of the defendant and you will go no further in your deliberations.
>
> As indicated, the wrongful act alleged by plaintiff is a

decision by defendant to force him onto long-term disability because of his age. If you find that defendant committed this wrongful act, you must decide when plaintiff knew or should have known, using a reasonable amount of diligence, of this wrongful act. We will ask you to provide us with the date plaintiff obtained or should have obtained this knowledge. On this point you may wish to consider that plaintiff received a performance review set of objectives on December 12, 1986, and that he had met with Mr. Thompson and Ms. Marszalkowski on September 1st, 1987, prior to beginning long-term disability on September 15th, 1987. You may also consider any testimony, correspondence, conversations or any evidence which you believe indicates when plaintiff knew or should have known of the wrongful act.

If you find the plaintiff has proved each element you must also address the question of the defendant's affirmative defense. Defendant contends that regardless of anything else to the contrary it would have terminated the plaintiff for good and sufficient reasons, i.e. the nonperformance of or inability of plaintiff to perform his job.

> Since this is an affirmative defense the burden of proof by a preponderance of the evidence is on the defendant to prove this defense. If the defendant carries the burden of proof you must find in favor of the defendant, but if the defendant fails to carry his burden of proof on this defense then you must continue in your deliberations and address the issue of damages.

The trial judge also composed an interrogatory on the timeliness question and included it in the verdict form. The verdict form, as completed by the jury, appeared as follows:

VERDICT

We, the undersigned Jurors, duly drawn, empaneled and sworn to try the above-entitled action, find as follows:

1. Is plaintiff entitled to recover for age discrimination? (check one)

Yes	No
X	

If your answer is "no", do not answer any further questions. If your answer is "yes", continue to answer questions 2-4.

2. Enter the date plaintiff knew or should have known of the age discrimination you found. (enter date)

12/12/86

3. What is the amount of back pay and benefits plaintiff is to recover on account of the age discrimination you have found? (fill in blank)

201,803.24

4. Did the defendant willfully violate the law when it constructively discharged plaintiff? (check one)

Yes	No
X	

On the basis of the jury's determination that the Petitioner knew or should have known of the age discrimination on December 12, 1986, which was more than 300 days before the EEOC charge was filed, the trial court entered judgment on behalf of the Respondents.

On appeal, the Petitioner argued, inter alia, that the jury instruction on the charge-filing issue was misleading,

inadequate, and prejudicial. The Petitioner argued that the instruction improperly shifted the burden of proff on the timeliness issue, and that the evidence was insufficient to support the imposition of the limitations bar.

The United States Court of Appeals for the Eleventh Circuit affirmed without opinion on June 1, 1992. The Petitioner timely filed his Petition for Rehearing and Rehearing En Banc, which was denied on July 30, 1992.

ARGUMENT

The jury instruction formulated by the trial judge at its own instance improperly shifted to the plaintiff (Petitioner here) the burden of proving compliance with the limitations period for filing an administrative charge of age discrimination. That error, coupled with

the assignment of an incorrect standard of proof to carry the burden, resulted in a judgment by the trial court in favor the Respondent, despite the jury's finding of willful age discrimination in the Petitioner's constructive discharge. It is highly likely that a properly instructed jury would have found in favor of the Petitioner as to the limitations issue.

The instruction is divisible into two parts. The first is the end of the instructions describing elements of the Petitioner's burden of proof. At the very end of that section, the instruction addresses the limitations issue. Immediately thereafter, the instruction begins to describe the Respondent's burdens. The placement of the instruction leads inevitably to the conclusion that

the limitations issue was part of the Petitioner's case. The instruction then identifies the Respondent's single affirmative defense to be its claim that, discrimination aside, the Petitioner would have been fired for poor job performance anyway. The statement that the Respondent had a single affirmative defense, and that it was not the limitations question, necessarily implied that the limitations issue was for the Petitioner to prove.

The proceedings in this case underscore the wisdom of the rule that, generally, it is error for a trial judge to raise sua sponte a limitations defense (or any other affirmative defense), particularly at trial. See, e.g., Wagner v. Fawcett Publications, 307 F.2d 409, 412 (7th Cir. 1962); Davis v. Bryan, 810 F.2d 42, 45 (2d Cir. 1987); Banks v. Chesapeake

and Potomac Telephone Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986); Haskell v. Washington Township, 864 F.2d 1266, 1273 (6th Cir. 1988). At both trials, the Respondent failed to request that the issue be submitted to the jury. There may have been sound, tactical reasons for this choice, such as a desire to avoid the implication that the discrimination did, in fact, occur. Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160-61 (3d Cir. 1989). Because of the Respondent's waiver of the issue, it is apparent that neither party was prepared to debate the pertinent law, which resulted in the trial court applying an inaccurate standard.

Clearly, rather than the "know or should have known of the discrimination" standard, the limitations period for a

constructive discharge based upon a continuing pattern of harassment accrues when the discriminatory conduct ends. If any acts of age-based harassment occurred within 300 days of the filing of the charge, then the charge was timely. See, Havens Realy Corp. v. Coleman, 455 U.S. 363, 380-81 (1982); Hendrix v. City of Yazoo City, Miss., 911 F.2d 1102, 1103-04 (5th Cir. 1990); Haithcock v. Frank, 958 F.2d 671,677-79 (6th Cir. 1992); Davidson v. Indiana-American Water Works, 953 F.2d 1058, 1059-60 (7th Cir. 1992). Clearly, at least one incident occurred within the limitations period--the September 1, 1987 refusal of the Respondent to offer the Petitioner any other position, as he went on long-term disability. Had the jury been properly instructed, it is highly likely that the limitations problem would

not have developed at all.

In any event, the jury's finding is insufficient to support the court's decision to implement the limitations bar. It the burden rests with the defendant to show an untimely filing, it failed to do so. There simply was no finding that the charge was filed more than 300 days after the last act of discriminatory conduct, and thus the defense was not established. The issue, then, is whether that burden of proof properly belonged to the Respondent.

Since this Court's decision in Zipes v. Trans World Airlines, Inc., 455 U.S. 385 (1982), it has been established law that the period for filing an administrative charge of employment discrimination is not jurisdictional, but is more akin to a statute of limitations. The charge-filing period is therefore

subject to the doctrines of waiver, estoppel, and tolling. Id. at 394.

In addition to Zipes, the Court has provided direction for the calculation of the charge-filing period in other decisions. See, Delaware State College v. Ricks, 449 U.S. 250 (1980); Chardon v. Fernandez, 454 U.S. 6 (1982). See also, Irwin v. Veterans Administration, 498 U.S. ___, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990). (Time period for filing employment discrimination action against federal government is subject to equitable tolling). However, the Court has not directly addressed the burden of proof issue. The question of the assignment of the burden of proving at trial the plaintiff's compliance with, or violation of, the charge-filing limitations period remains an unsettled issue, and the

circuit courts of appeal are in conflict as to the proper rule.

The rule set forth in Ricks and Chardon is that the time for filing a charge with the EEOC begins to run when the employee becomes aware of the discriminatory act. Ricks, 449 U.S. at 259; Chardon, 454 U.S. at 8. Furthermore, under Ricks, it appears that if a complaint, on its face, shows that it was filed outside the limitations period, as measured from the relevant incidents alleged in the complaint, the complaint is subject to dismissal.

These precepts are easily applied in cases in which the discriminatory act took place at a discrete, clearly-identifiable point in time, and in cases in which the plaintiff was explicitly placed on notice of the discriminatory act at a specific

time. In such cases, burden of proof questions will likely have no significance.

However, constructive discharge is a particularly nebulous area in terms of specifying a single date upon which the discriminatory conduct occurred for purposes of the limitations period for filing an administrative charge. Typically, this form of unlawful conduct develops over a period of time, rather than taking place at one identifiable point in time. In these cases, the process of the identifying the key date that triggers the running of the statute of limitations is difficult, at best.

The primary issue in this petition addresses only a part of that process. who should bear the burden of proving when the limitations period accrued? Which

party should be saddled with the duty to analyze the various pre-discharge incidents and to prove its conclusions to jury? Should that task fall to the plaintiff, who directly experienced the situation but who played no part in creating the circumstances surrounding the issue? Or should the burden of proving a limitations problem be borne by the defendant, as the party responsible for the circumstances?

There is a clear conflict among the federal circuits on this question. The courts of appeal have divided into two seemingly-unreconcilable schools of thought. One school places the burden of proving timely filing on the plaintiff, and the other school looks to the defendant to demonstrate a violation of the limitations period, just as the

defendant must prove any affirmative defense.

The statute of limitations has been designated as an affirmative defense. Fed.R.Civ.P.8(c). This Court has observed that "we should regard the plea of limitations as a 'meritorious defense, in itself serving a public interest'". United States v. Kubrick, 444 U.S. 111, 117 (1979), quoting, Guaranty Trust Co. v. United States, 304 U.S. 126, 136 (1938). The statute of limitations is "a defense separate from the denial of a breach of duty". Kubrick, 444 U.S. at 125.

In addition, numerous courts have held that a claimed violation of the statute of limitations is an affirmative defense, which must be pleaded by the defendant, and which is waived if not timely raised. See, e.g., Wade v. Orange

County Sheriff's Office, 844 F.2d 951, 955 (2d Cir. 1988); Bradford-White Corp. v. Ernst & Whinney, 872 F.2d 1153, 1160-61 (3d Cir. 1989); Hernandez v. Hill Country Telephone Co-Op, Inc., 849 F.2d 139, 142 (5th Cir. 1988); Haskell v. Washington Township, 864 F.2d 1266, 1273 (6th Cir. 1988); Heiar v. Crawford County, Wis., 746 F.2d 1190, 1196-97 (7th Cir. 1984); Schmidt v. United States, 933 F.2d 639, 640 (8th Cir. 1991); Roberts v. College of the Desert, 870 F.2d 1411, 1414 (9th Cir. 1988); Hodgson v. Humphries, 454 F.2d, 1279, 1284 (10th Cir. 1982); Weaver v. Casa Gallardo, Inc., 922 F.2d 1515, 1521 (11th Cir. 1991); and Banks v. Chesapeake and Potomac Telephone Co., 802 F.2d 1416, 1427 (D.C. Cir. 1986).

These decisions clearly place the burden of proving this affirmative defense

on the defendant. If the issue is not raised by the defendant at trial, these decisions hold that the defense, like any other except jurisdiction, is waived altogether. This line of cases should control the result here. The Respondent did not raise a timeliness issue at all during the first trial of this action. Consistently, at the second trial, the Respondent did not request a jury instruction on timeliness of the charge. The defense should have been deemed waived. The trial court erred in raising the issue, sua sponte. The court erred further in formulating its own jury instruction which effectively placed upon the petitioner the burden of proving that his charge had been timely.

On appeal, the Eleventh Circuit rejected without opinion the petitioner's

burden shifting argument. That result is consistent with recent Eleventh Circuit rulings that the burden rests on the plaintiff to show that the charge was filed in a timely fashion. See, e.g., Lampliter Dinner Theater v. Liberty Mutual Insurance Co., 792 F.2d 1036, 1043 (11th Cir. 1986); Grant v. Preferred Research, Inc., 885 F.2d 795, 799 (11th Cir. 1989). These decisions represent a separate and distinct approach to the issue of the burden of proving timeliness of the charge, and are in direct conflict with the cases cited previously, including the Eleventh Circuit's own holding in Weaver v. Casa Gallardo, Inc.

The Eleventh Circuit is joined by the Fifth Circuit in explicitly assigning to the plaintiff the burden of proof. See, e.g., Emmons v. Southern Pacific

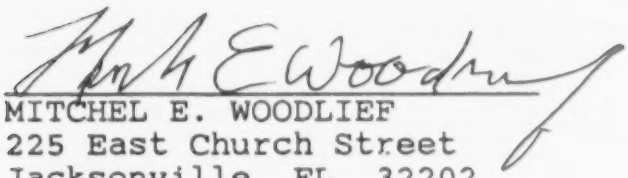
Transportation Co., 701 F.2d 1112, 1117-18 (5th Cir. 1983). The Fifth Circuit is also like the Eleventh Circuit in that there is a conflict among its own decisions. See, Hernandez v. Hill Country Telephone Co-Op, Inc., 849 F.2d 139, 142 (5th Cir. 1988). The First Circuit aligns itself with Fifth and Eleventh Circuits in assigning the burden to the plaintiff. See, Tagliente v. Himmer, 949 F.2d 1,5 (1st Cir. 1991).

CONCLUSION

There is a clear conflict among the circuits on the burden of proof issue. Because this is a procedural question of considerable importance to the conduct of any civil trial which involves a limitations claim, this Court should grant certiorari in this case to establish a coherent rule that can be applied

uniformly by the trial courts.

Respectfully submitted,



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UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

WILLIAM R. SPEACHT,
Plaintiff,

v. Case No.: 88-884-CIV-J-12

MOBIL CHEMICAL COMPANY,
Defendant.
_____/

JUDGMENT IN A CIVIL CASE

XX **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUGED that the jury having found that the Plaintiff in this cause knew or should have known of the age discrimination as of December 12, 1986, the Court hereby enters judgment in

favor of the Defendant, in that the Plaintiff's charge of age discrimination to the Equal Employment Opportunity Commission was untimely filed.

April 8, 1991

/s/ Jane A. Restani

JANE A. RESTANI
UNITED STATES DISTRICT JUDGE
(By Designation)

c:

Counsel of Record

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 91-3421
Non-Argument Calendar

(D. C. Docket No. 88-884-CIV-J-12)

WILLIAM R. SPEACHT,

Plaintiff-Appellant,

versus

MOBILE CHEMICAL COMPANY, a
division of Mobil Oil Corporation,
a New York Corporation,

Defendant-Appellee.

Appeal from the United States
District Court
for the Middle District of Florida

(June 1, 1992)

Before DUBINA, Circuit Judge, HILL and

CLARK*, Senior Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.

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*See Rule 34-2 (b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 91-3421

WILLIAM R. SPEACHT,

Plaintiff-Appellant,

versus

MOBIL CHEMICAL COMPANY,
a Division of Mobil Oil Corporation,
a New York Corporation,

Defendant-Appellee.

On Appeal from the United States District Court for the Middle District of Florida

---

ON PETITION(S) FOR REHEARING AND SUGGESTION(S) OF REHEARING EN BANC

Before: DUBINA, Circuit Judge, HILL and CLARK*, Senior Circuit Judges.

PER CURIAM:

(X) The Petition(s) for Rehearing are

DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the

reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Joel Dubina
UNITED STATES CIRCUIT JUDGE

*See Rule 34-2(b), Rules of the U.S. Court of Appeals for the Eleventh Circuit.

ORD-42
(9/91)

PLAINTIFF'S PROPOSED JURY INSTRUCTION
NO. 28
STATUTE OF LIMITATIONS DEFENSE

There is an issue in this case arising from a defense asserted by the Defendant and is based upon what is called the Statute of Limitations. This simply is a provision of the law requiring that a discrimination claim be commenced within a prescribed period of time, otherwise the suit is barred or precluded.

In a case like this one the time limit placed upon the Plaintiff began to run when the Plaintiff knew, or by the exercise of reasonable care should have known, that his position as a Sales Representative for the Defendant was being terminated.

In the instance, the applicable limitation period is 300 days, and the Defendant claims that the suit is barred

because the Plaintiff knew, or by the exercise of reasonable care should have known more than 89 days before the filing of the claim on January 20, 1988 that his position as a Sales Representative for the Defendant was being terminated.

As to this issue you are instructed that the Defendant has the burden of proof by preponderance of the evidence.

With regard to the Plaintiff's knowledge, you are instructed that the means of knowledge are ordinarily equivalent in law to knowledge. So, if it appears from a preponderance of the evidence in the case that the Plaintiff had information which would normally have lead a reasonably careful person of the same age, mental capacity, intelligence, training and experience to make inquiry through which he would surely learned

certain facts, then the Plaintiff may be found to have had actual knowledge of those facts, the same as if he had made such inquiry and had actually learned such facts.

Pat. Jury Instruction-5th Cir. 1983 Ed.
Special Instruction No. 5
Hamilton v. 1st Source Bank, 58 U.S.L.W. 2453 (4th Cir. Feb. 5, 1990)

Given: _____

Modified: _____

Refused: _____

Withdrawn: _____

... defendant are not pretexts you may still find that the plaintiff was discharged because of his age if one factor in the decision to discharge was age and it, in fact, made a difference in the decision to discharge plaintiff.

Now, if you find that the plaintiff has failed to prove any one of these elements your verdict must be in favor of the defendant and you will go no further in your deliberations.

As indicated, the wrongful act alleged by plaintiff is a decision by defendant to force him onto long-term disability because of his age. If you find that defendant committed this wrongful act, you must decide when plaintiff knew or should have know, using a reasonable amount of diligence, of this

wrongful act. We will ask you to provide us with the date plaintiff obtained or should have obtained this knowledge. On this point you may wish to consider that plaintiff received a performance review set of objectives on December 12, 1986, and that he had met with Mr. Thompson and Ms. Marszalkowski on September 1st, 1987, prior to beginning long-term disability on September 15th, 1987. You may also consider any testimony, correspondence, conversations or any evidence which you believe indicates when plaintiff knew or should have known of the wrongful act.

If you find the plaintiff has proved each element you must also address the question of the defendant's affirmative defense. Defendant contends that regardless of anything else to the contrary it would have terminated the

plaintiff for good and sufficient reasons, i.e. the nonperformance of or inability of plaintiff to perform his job.

Since this is an affirmative defense the burden of proof by a preponderance of the evidence is on the defendant to prove this defense. If the defendant carries the burden of proof you must find in favor of the defendant but if the defendant fails to carry his burden of proof on this defense then you must continue in your deliberations and address the issue of damages.

As you see, we are winding down now. We've gotten to the issue of damages.

Members of the jury, you should remember that even though I am instructing you on damages such an instruction is no indication as to what you should determine -- as to what your determination should be

on other issues.

If you have found that the defendant did discharge plaintiff and that the defendant did discriminate against plaintiff in violation of the law...

Supreme Court, U.S.
FILED
DEC 7 1992
OFFICE OF THE CLERK

NO. 92-803

In the Supreme Court of the United States

OCTOBER TERM, 1992

WILLIAM R. SPEACHT,
Petitioner,

vs.

MOBIL CHEMICAL COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND CORPORATE AFFILIATIONS

The Petitioner in this proceeding is William R. Speacht, who was Plaintiff in the court below. The Respondent is Mobil Chemical Company, who was Defendant in the court below. In accordance with Rule 29.1 of the Rules of the Supreme Court, Respondent discloses that it is a division of Mobil Oil Corporation, which is a subsidiary of Mobil Corporation.

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IN THE

SUPREME COURT OF THE UNITED STATES

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WILLIAM R. SPEACHT,
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TO THE UNITED STATES COURT OF APPEALS
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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Respondent, Mobil Chemical Company, respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit, filed in this proceeding on October 28, 1992, be denied.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the statutes and rules set forth in the Petition, this case involves the Seventh Amendment to the United States Constitution, which provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

Fed. R. Civ. P. 49(b) provides:

> **General Verdict Accompanied By Answer To Interrogatories.** The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and the answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

Fed. R. Civ. P. 51 Provides:

> **Instructions To Jury: Objection.** At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury. The court, at its election, may instruct the jury before or after argument, or both. No party may assign as error the giving or the failure to give an instruction unless that party objects thereto before the jury retires to consider its verdict, stating distinctly the matter objected to and the grounds of the objection. Opportunity shall be given to make the objection out of the hearing of the jury.

STATEMENT OF THE CASE

Petitioner's Statement of the Case contains several significant misstatements and omissions concerning the record in this case, which Respondent Mobil has attempted to clarify below. As stated in the Petition, this is an employment discrimination suit pursuant to the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. Section 621 *et seq.* (ADEA). Petitioner William R. Speacht, who was plaintiff below, pursued a rather unusual theory of liability under the ADEA. Speacht never alleged that he was "fired" by Mobil; rather his theory was that he was involuntarily forced into a disability retirement, in a manner that constituted a "constructive discharge," by virtue of Mobil placing conditions on the performance of his job which allegedly were impossible to meet given Speacht's medical condition. The alleged motivation for this action was that it was part of a program

aimed at reducing the size and cost of Mobil's sales force by eliminating its older sales representatives. Mobil responded to the complaint by not only denying that it had engaged in any unlawful discrimination, but also by raising a specific affirmative defense that Speacht had not filed a timely charge of discrimination with the Equal Employment Opportunity Commission (EEOC) as required by Section 7(d) of ADEA, 29 U.S.C. Section 626(d).

The action proceeded to a four-day jury trial before the Honorable L. Clure Morton (sitting by designation) in March of 1990. Shortly before trial, in a motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and again during trial in a motion for directed verdict pursuant to Rule 50 of the Federal Rules of Civil Procedure, Mobil again raised the issue that Speacht's charge was untimely. Both motions were denied. However, at the conclusion of the trial and after deliberations by the jury, the jury announced that it was hung, and the district court declared a mistrial.

The action was reset for a jury trial which took place during April, 1991 before the Honorable Jane Restani (again sitting by designation). At the trial, the evidence revealed that Speacht worked as a sales representative for the Design Products division of Mobil, which was based in Macedon, New York. Design Products manufactures and sells bread bags to various customers in the baking industry throughout the United States. In August, 1985, Speacht transferred from his sales position in Connecticut to a sales representative position in a newly created territory in Jacksonville, Florida. However, things did not go particularly well for Speacht after transferring to his new position. In January, 1986, Sid Smith, national accounts manager and Speacht's superior, sent Speacht a memorandum complaining that Speacht had been "camped in

Jacksonville," not adequately covering and developing his new territory, and that he was "unimpressed with [Speacht's] new 'start' in the South." Thereafter, Speacht had a number of additional disagreements, both written and oral, with his superiors, over the issues of territory coverage, the necessity of various written reports, and other philosophical issues as to how the territory should be handled.

Finally, in June, 1986, in response to a very critical memorandum from his immediate supervisor, Sid Helms, Mobil's district manager based in Atlanta, Sceacht raised the issue of his physical ability to cover the territory, and referred to his high blood pressure and prior heart surgery he had undergone in 1982. Speacht stated that "driving long distances certainly *now* tires me greatly, making it a little *dangerous* for me and Mobil to drive alone," and that his wife was accompanying him on longer trips "to assist with the driving." (First emphasis in original, second emphasis added). This was the first time that Speacht had ever asserted, before or after his transfer to Jacksonville, that any physical limitations prevented him from performing his new job. After a consultation with Mobil physician Dr. Jack Kerns, who was based at the Company's headquarters in Macedon, New York, Dr. Kerns placed Speacht on temporary disability until his private cardiologist in Jacksonville was able to change his blood pressure medication, which had been causing Speacht light-headedness and dizziness, and had been interfering with his ability to drive longer distances. After the blood pressure medication was changed, Speacht was released to return to work in early September, 1986.

Approximately a month later, in October, 1986, Speacht was again placed on temporary disability. This second period of disability followed an examination by Dr.

Kerns, during which Speacht reported a recent episode of vertical diplopia (or double vision), and also stated that he was not able to physically exceed 60 to 70 miles of driving. During this period of disability, in November, 1986, Speacht wrote a letter to Mobil management accusing his supervisor (Sid Helms) of "directing and orchestrating a campaign to have [him] placed on long-term disability. . . ." However, during this period, Speacht was referred by his Jacksonville cardiologist to a neurologist, who, after performing a battery of tests, could not find a specific cause for Speacht's episode of double vision, but suspected that he may have had a "transient ischemic event" (temporary lack of blood to his brain). Thereafter, in late November, 1986, Speacht's cardiologist wrote a letter to Dr. Kerns releasing Speacht "to return to work and to drive his car," and placed "no specific limitations" on him.

On December 12, 1986, after Speacht was also examined and released by Dr. Kerns, Speacht had a meeting with his supervisors (Sid Helms and Gary Ganaway) and with Mobil's employee relations manager to review his 1986 performance evaluation, and to discuss the performance problems he had had prior to his periods of temporary disability. During this meeting, Speacht was advised that his performance had not been satisfactory, and that he was receiving an overall appraisal of "FM" (fails to meet job requirements). He was also presented with a set of short-term objectives, which were mandatory job requirements designed to improve his performance, and which also are the objectives that Speacht has alleged throughout this action were impossible to meet. Such short-term objectives were automatic under Mobil policy upon assessment of an "FM" appraisal. Speacht testified that he understood that the "FM" appraisal meant that he had done "a very, very poor job," that "you're subject to lose you job," and that he was very upset when he saw the "big glaring 'FM' star-

ing [him] in the face."

It is undisputed that Speacht never attempted to meet the short-term objectives, and never performed any work as sales representative after the December 12, 1986 meeting. Shortly thereafter, Dr. Kerns received a letter from Speacht's cardiologist dated December 18, 1986, stating that he was of the opinion that Speacht could not fulfill the requirements of his job (as specified in the short-term objectives) "due to his medical condition" and that he was advising Speacht to seek "*medical retirement* on disability." (Emphasis added).

Accordingly, Speacht again returned to a disability status in December, 1986. Under Mobil's policy, he was required to exhaust his short-term disability benefits before he was eligible to obtain long-term disability benefits . In August, 1987, Speacht applied for long-term disability benefits, and obtained a certification from his physician that he was permanently disabled. At this time, he also filed an application seeking social security disability benefits.

On September 1, 1987, Speacht met with a Mobil employee relations manager and with a benefits specialist to review his application for long-term disability benefits and to go over his benefit options. It was during this meeting that Speacht inquired whether Mobil had any other jobs available for him. After this meeting, Speacht wrote a letter to the Company in which he stated, "Also, I want to confirm for Social Security Interview - that no other job or position was extended to me - correct?" Speacht's application for long-term disability benefits was approved, and he began drawing benefits in the amount of $1,933 per month from September 15, 1987 through the date of trial.

During the trial, and at the conclusion of Plaintiff's case, Mobil moved for a directed verdict on the ground that, given Speacht's theory in this case, his EEOC charge was untimely filed. The Company also had asserted this issue in its trial brief filed before trial, and had included it as an issue to be resolved in the joint pretrial stipulation. The district judge denied Mobil's motion for directed verdict, but stated that she was "interested" in the timeliness argument, and that perhaps the jury should resolve the factual issue". . .that if there was a constructive discharge, when did it occur."

It was only after the above sequence of events that the district judge, at the jury charge conference, proposed a special interrogatory on the timeliness issue, and an additional instruction addressing this question. Accordingly, to suggest that the district court raised this issue *sua sponte,* as Speacht does in his Petition (on page 10 and again on page 26), is a blatant misrepresentation of the record in this case. At the charge conference, the district judge included the special interrogatory because she believed that there was a "material issue of fact" on the timeliness question.

Conspicuously omitted from the Petition is any mention of Speacht's failure to properly object to the district court's proposed instruction on the special interrogatory as required by Rule 51 of the Federal Rules of Civil Procedure. The only objection raised by Speacht to the district court's proposed charge was as follows:

> I object generally to it because I don't believe there is a question of fact as to the statute of limitations. Then more specifically under the pattern jury instructions for Circuit [sic], the standard is knew or by the exercise of reasonable care

should have known that his position was being terminated.

In response to the only specific objection made by Speacht, the district court changed the language in the instruction to accommodate Plaintiff's objection (changing "knew" to "knew or should have known, using a reasonable amount of diligence"). At the conclusion of the trial, after both sides had rested, the district court again accommodated the only minor objection Speacht set forth (changing "onto disability retirement" to "onto long-term disability"). No other objection to the instruction was made by Speacht anywhere in the record, and no objection was ever made by Speacht to the district court's refusal to give Plaintiff's proposed instruction addressing the statute of limitations issue in general.

As stated in the Petition, the jury, at the conclusion of its deliberations, found as a fact, in response to the special interrogatory, that Speacht "knew or should have known" of any age discrimination against him on December 12, 1986. Since Speacht did not file his charge of discrimination with the EEOC until January 20, 1988, or some 389 days after the discriminatory occurrence as found by the jury, the district court found that his charge was untimely under Section 7(d) of the ADEA, 29 U.S.C. Section 626(d) and entered judgment for Mobil.

Speacht appealed the district court's judgment to the United States Court of Appeals for the Eleventh Circuit. The *only* issue asserted by Speacht before the appellate court was: "Whether the trial court erred in its instruction to the jury on whether the Appellant filed his pre-suit claim within the 300 day statutory limitation." In response, Mobil asserted *inter alia* before the court of appeals that Speacht had waived any objection to the in-

struction under Rule 51 of the Federal Rules of Civil Procedure, and further that the district court had not abused the wide discretion allowed it under Rule 49(b) of the Federal Rules of Civil Procedure in utilizing special interrogatories to resolve disputed issues of fact. On June 1, 1992, the Eleventh Circuit rendered an unpublished "per curiam: affirmed" decision.

SUMMARY OF THE ARGUMENT

The second question presented for review in the Petition was neither raised before nor considered by the court of appeals, and cannot be raised for the first time before this Court. *Springfield v. Kibbe,* 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987); and *Tacon v. Arizona,* 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973). Additionally, the Petition is fundamentally flawed in that it makes unwarranted assumptions about the basis for the decision by the court of appeals, which was an unpublished "per curiam: affirmed" decision. It is just as likely that the basis for the appellate court's decision was that Petitioner waived any objection to the district court's jury instruction by not raising a proper objection as required by Rule 51 of the Federal Rules of Civil Procedure.

The Petition, although phrased in terms of whether the district court improperly placed the burden upon the plaintiff in instructing the jury on Mobil's statute of limitations defense, in actuality, is little more than an attempt to circumvent a factual finding by the jury in responding to a special interrogatory submitted by the district court pursuant to Rule 49(b) of the Federal Rules of Civil Procedure. Disturbing the jury's factual finding would violate the Seventh Amendment to the United States Constitution. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.,* 369 U.S. 355, 358-59, 82 S. Ct. 780, 783 (1962). Finally,

Petitioner's alleged "conflict" among the circuits as to whether the plaintiff or the defendant has the burden of asserting an ADEA statute of limitations defense (i.e., whether a charge was timely filed pursuant to Section 7(d) of the Act) is an artificial conflict that does not exist. Accordingly, the Petition does not meet any of the requirements set forth in Rule 10 of the Rules of the Supreme Court, governing the guidelines for a Petition for Writ of Certiorari, and should be denied.

ARGUMENT

I. PETITIONER'S SECOND ISSUE, WHICH APPARENTLY PURPORTS TO BE A "CONTINUING VIOLATION" ARGUMENT, CANNOT BE RAISED FOR THE FIRST TIME BEFORE THIS COURT SINCE IT WAS NEITHER RAISED BEFORE NOR CONSIDERED BY THE COURT OF APPEALS.

In the second question presented for review in the Petition, Petitioner asserts what appears to be a "continuing violation" theory, i.e., that the statute of limitations could not bar his claim of constructive discharge, since an alleged "related act of discrimination" occurred less than 300 days before Speacht's discrimination charge was filed. This is an issue which Speacht is attempting to raise for the first time in this Court. As stated above, the *only* issue raised by Speacht before the court of appeals was an assertion that the district court erred in its instruction to the jury relating to the special interrogatory included in the verdict form, which was included so that the jury could resolve the factual question of when Speacht "knew or should have known" of the discriminatory conduct alleged in this case. As a general rule, this Court will not consider issues which were neither raised before nor considered by the court of appeals. See *United States v. Williams*, 504

U.S. ____, 112 S. Ct. 1755 (1992); *Tacon v. Arizona*, 410 U.S. 351, 352, 93 S. Ct. 998, 999 (1973); and *Adickes v. S. H. Kress and Co.*, 398 U.S. 144, 147 n.2, 90 S. Ct. 1598, 1602-03 n.2 (1970); see also *Springfield v. Kibbe*, 480 U.S. 257, 259, 107 S. Ct. 1114, 1115 (1987) (where this Court reiterated that this rule had "special force" where the party seeking to raise the issue has failed to raise a proper objection to a jury instruction under Rule 51 of the Federal Rules of Civil Procedure). This Court has recognized a few limited exceptions to this principle, such as issues relating to federal subject matter jurisdiction, *Andrus v. Charlestone Products Co.*, 436 U.S. 604, 98 S. Ct. 2002 (1978); issues of appellate jurisdiction and whether a decision is appealable, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S. Ct. 1202 (1976); or nonjurisdictional issues involving questions of great public importance and concern, *Connor v. Finch*, 431 U.S. 407, 97 S. Ct. 1828 (1977) (concerning reapportionment of congressional districts). However, none of these exceptions are even arguably aplicable to this case. Since Speacht's "continuing violation" issue was neither raised before nor considered by the court of appeals, it cannot be raised for the first time before this Court.

Of course, even if the issue could be properly raised, this Court rejected the "continuing violation" theory in similar circumstances in *Delaware State College v. Ricks*, 449 U.S. 250, 101 S. Ct. 498 (1980) (charge filing period under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. Section 2000e *et seq.*, was triggered by notice to a university professor of the university's decision to deny him tenure, not the subsequent date that his employment actually was terminated); see also *Davidson v. Indiana - American Water Works*, 953 F.2d 1058 (7th Cir. 1992) (rejecting a continuing violation argument in a constructive discharge claim pursuant to the ADEA). Peti-

titioner may well be correct with respect to his assertion (Petition, p.22) that constructive discharge claims can be "particularly nebulous . . . in terms of specifying a single date upon which the discriminatory conduct occurred. . . ." However, this is precisely why the district court presented this factual issue to the jury via a special interrogatory, which allowed both sides a full opportunity to argue, on the basis of the evidence presented, as to when this event occurred.

II. PETITIONER MAKES UNWARRANTED ASSUMPTIONS ABOUT THE BASIS FOR THE DECISION BY THE COURT OF APPEALS.

A fundamental flaw in the Petition is that it makes the quantum leap assumption that the Eleventh Circuit, in rendering its decision in this case, based its decision on the ground that the district court, through its jury instruction, shifted the burden of proof to the plaintiff on the statute of limitations question (although, as is set forth below, this is not what occurred before the district court). Speacht fails to point out in his Petition that one of the principal arguments raised by Mobil before the court of appeals was that Speacht had waived his objection to the district court's jury instruction by not raising a proper specific objection as required by Rule 51 of the Federal Rules of Civil Procedure. Indeed, a significant portion of the briefs and oral argument before the Eleventh Circuit was devoted to this issue. It is just as likely that the court of appeals summarily affirmed the district court's judgment because it agreed with Mobil's waiver argument under Rule 51; or the court of appeals may have believed that the district court did not abuse the wide discretion it is allowed in formulating special interrogatories (and related instructions) under Rule 49(b) of the Federal Rules of Civil Procedure. In either event, had the court of appeals determined that any

significant issues had been raised during the appeal of this case about the district court's judgment, surely it would have chosen to write an opinion explaining the precise basis for its decision.

III. PETITIONER IS MERELY ATTEMPTING TO CIRCUMVENT A FACTUAL FINDING BY THE JURY IN CONTRAVENTION OF THE SEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Although Speacht, in his Petition, goes to great lengths to argue that the district court's jury instruction improperly placed the burden of proof on the plaintiff with respect to the statute of limitations defense, this case boils down to frail attempt on Speacht's part to circumvent a factual finding by the jury in response to a special interrogatory. Speacht's entire argument throughout the appellate proceedings in this case has been based upon the supposition that the district court erroneously instructed the jury as to Mobil's "statute of limitations defense." This is a complete mischaracterization of what the district court either did or intended to do. The district court never intended to submit to the jury the issue of *law* of whether Mobil had sustained its statute of limitations defense. Rather, what the district court did do, was to submit to the jury a special interrogatory under Rule 49 of the Federal Rules of Civil Procedure for a *finding of fact.* Rule 49(b) expressly provides that a district court may combine "written interrogatories upon one or more *issues of fact*" with a general verdict (emphasis added). Rule 49 is intended to be a very flexible tool, and district courts traditionally have been accorded wide discretion in determining whether special interrogatories should be employed, and if so, how they should be framed. *Barton's Disposal Service, Inc. v. Tiger Corp.*, 886 F.2d 1430, 1434 (5th Cir. 1989); *Dreiling v.*

General Electric Corp., 511 F.2d 768, 774 (5th Cir. 1975); *Peterson v. Peterson*, 400 F.2d 336, 343 (8th Cir. 1968); and *L'Urbaine Et La Seine v. Rodriguez*, 268 F.2d 1, 5 (5th Cir. 1959). Since the jury's finding in this case was one of fact (a finding that is also supported by overwhelming evidence in the record and which both sides had a full opportunity to argue to the jury as to how that factual issue should be resolved), under the Seventh Amendment to the United States Constitution, it cannot be disturbed. *Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 358-59, 82 S. Ct. 780, 783 (1962).

IV. THE CONFLICT IN CIRCUITS ASSERTED IN THE PETITION IS NON-EXISTENT AND, AT BEST, A FIGMENT OF PETITIONER'S VIVID IMAGINATION.

The principal ground asserted in support of the Petition herein is that the decision of the Eleventh Circuit below (whatever the basis for that decision may have been), is allegedly in conflict with a number of other circuits, and this Court is asked to resolve the "conflict" as to whether the plaintiff or the defendant has the burden of proving the statute of limitations defense under the ADEA (i.e., the timely filing of a charge pursuant to Section 7(d) of the Act). A careful examination of the cases cited for this proposition, however, reveals that, in reality, there is no conflict at all, but simply a clever attempt on the part of Petitioner to try to comply with Rule 10 of the Rules of the Supreme Court.

For instance, the string of cases cited on pages 24 and 25 of the Petition merely stand for the basic proposition that, in general, a statute of limitations is an affirmative defense within the meaning of Rule 8(c) of the

Federal Rules of Civil Procedure, that must either be pled as an affirmative defense in the defendant's answer or otherwise properly raised in the district court, and is subject to waiver if it is not properly preserved.[1] Most of the cases cited are not even employment discrimination cases, and only one of the cases cited is an ADEA case, *Heiar v. Crawford Co.*, 746 F.2d 1190 (7th Cir. 1984), *cert. denied*, 472 U.S. 1027, 105 S.Ct. 3500 (1985) (and this case did not address the charge-filing limitation, but the two year statute of limitations contained in the Act that was repealed by the Civil Rights Act of 1991). Two of the cases, *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515 (11th Cir. 1991) and *Hernandez v. Hill Country Telephone Cooperative, Inc.*, 849 F.2d 139 (5th Cir. 1988), did address the analogous charge-filing period pursuant to Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5(e). Of course, in this case, Mobil specifically raised the charge-filing requirement as an affirmative defense, and has treated it as such throughout this litigation.

The cases cited by Petitioner which allegedly conflict with the above general proposition, in actuality, create no conflict at all. None of the cases cited are even employment discrimination cases, much less cases dealing with who has the burden of establishing that a charge was timely filed pursuant to Section 7(d) of the ADEA. *Lampliter Dinner Theater, Inc. v. Liberty Mutual Insurance Co.*, 792 F.2d 1036 (11th Cir. 1986) and *Grant v. Preferred Research, Inc.*, 885 F.2d 795 (11th Cir. 1989) both involved fraud claims under Alabama state law, and the only burden placed upon

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[1] Of course, Petitioner's argument that Mobil waived the statute of limitations defense, aside from the fact that this argument was not raised below, is utterly specious. Indeed, the Company raised this issue at every conceivable opportunity, including as an affirmative defense in its answer, by pretrial motion, as an issue in the joint pretrial stipulation, and during both trials in its motion for directed verdict.

the plaintiff in those cases was the issue of *tolling* the appropriate statute of limitations (i.e., when the plaintiff knew or should have known of the fraudulent conduct), not actually proving the statute of limitations defense. A similar ruling was reached in *Tagliente v. Himmer*, 949 F. 2d 1 (1st Cir. 1991) (which addressed the plaintiff's burden of tolling the statute of limitations in a fraud claim under Massachusetts law).

The only other case cited by Petitioner in support of his "conflict" argument is *Emmons v. Southern Pacific Transportation Co.*, 701 F.2d 1112 (5th Cir. 1983). Again, this was not an ADEA case, but an action pursuant to the Federal Employers' Liability Act (FELA), 45 U.S.C. Section 51 *et seq.* This case did place the burden upon the plaintiff to establish a timely filing in a FELA action under 45 U.S.C. Section 56. However, the precise basis for this ruling was that, in accordance with prior Fifth Circuit precedent under FELA, compliance with 45 U.S.C. Section 56 was deemed a "condition precedent to an injured employee's recovery in a FELA action," not an affirmative defense under Rule 8(c) of the Federal Rules of Civil Procedure. *Id.* at 1117. The court characterized the limitations period as a condition precedent under this particular statute because it not only barred "the claimant's remedy," but also destroyed "the employer's liability." *Id.* Whether *Emmons* was rightly or wrongly decided, it certainly creates no conflict with any other circuit authority as to who bears the burden of establishing that a charge was timely filed pursuant to Section 7(d) of the ADEA. As such, the Petition does not come close to meeting any of the criteria set forth in Rule 10 of the Rules of the Supreme Court as to the proper grounds for granting a Petition for Writ of Certiorari.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondent Mobil Chemical Co. respectfully prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be denied.

Respectfully submitted,

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